BEFORE THE THREE MEMBER PANEL
CONVENED PURSUANT TO RSMo. § 162.961

PARENTS OF A MINOR CHILD, ,	)	
	)	
Petitioners,	)	
	)	
v.	)	2005 - DESE - EFW/01
	)	
BOWLING GREEN R-I SCHOOL DISTRICT,	)	
	)	
Respondent.	)	

CORRECTED DECISION AND ORDER

This is the final and unanimous decision of the three member hearing panel empowered pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415(f) (1997), and Missouri law, §162.961.3, RSMo. The Panel, upon due consideration of evidence and argument presented in this matter, determines that the Petitioner has failed to demonstrate that the Bowling Green R-I School District violated the provisions of the IDEA, FAPE or the Missouri State Plan for Special Education with respect to services provided to the minor child at issue. In support of this decision, the Panel makes the following findings of fact and conclusions of law as set forth below.

PARTIES

1. Petitioner is the mother and legal guardian of the minor child, _____.

2. Respondent, Bowling Green R-1 School District ("Bowling Green"), is a Missouri school district organized pursuant to section 162.461 et seq., RSMo.

3. At the time in question, Petitioner and the minor child resided within the boundaries of Bowling Green for purposes of providing educational services. However, during portions of the 2004-2005 school year, the minor child fell outside the jurisdiction of Bowling

Green for educational services.

4. Bowling Green is responsible for identifying and serving special education students within its boundaries pursuant to the directives of the Missouri Department of Elementary and Secondary Education ("DESE") and in accordance with the Missouri State Plan for Special Education ("Missouri State Plan").

PROCEDURAL HISTORY

5. On January 20, 2005, Petitioner filed her initial Request for a Due Process Hearing.

6. On February 1, 2005, a three-member panel was empowered to hear Petitioner's request and to render its decision on or before March 7, 2005. The Panel consists of attorney Edward F. Walsh, George Wilson and Mary Matthews.

7. On March 18, 2005, the original decision deadline was extended to June 30, 2005, and has since been extended on various occasions at the request of the parties, either jointly or individually. Most recently, Respondent on January 17, 2005, requested and received an extension of the decision deadline through January 24, 2006.

8. Bowling Green filed two motions to dismiss this proceeding. Both motions were denied.

9. A due process hearing was convened in the above referenced cause on June 20-22, 2005 and July 26, 2005. Both parties had the opportunity to present evidence and cross-examine witnesses. A hearing transcript of 1014 pages was subsequently prepared and provided to all parties. Both parties submitted written arguments in support of their respective positions.

10. Petitioner was not represented by counsel in this action. Attorney Terri Goldman represented respondent Bowling Green. (T. 4).

11. Lisa Helm, Special Services Director for Bowling Green, appeared as the Respondent's designated representative.

EVIDENCE AND WITNESSES

12. Petitioner called the following witnesses to testify:

a) Petitioner, Mother of the minor child (T. 31);

b) _____ _____, Brother of the minor child (T. 174);

c) _____ _____, the minor child (T. 181);

d) Howard Frank Berlin, Superintendent of Schools (T. 234);

e) Matthew Chance, Assistant Principal (T. 287); and

f) William "Kent" Hufty, Principal (T. 346).

13 Respondent called the following witnesses to testify:

a) Timothy James Taylor, Licensed Professional Counselor, Evergreen Behavioral Services (T. 244);

b) Lisa Helm, Special Services Director (T. 421);

c) Tom Griggsby, Freshman Language/Art Teacher (T. 533);

d) Kathy Berlin, Language Arts/Creative Writing and Film Studies Teacher (T.749);

e) Judith Oberman, Family and Consumer Sciences Teacher (T. 799);

f) Stacey Bibb, Mathematics Teacher (T.818);

g) Jane Bell, Special Education Teacher (T. 856); and

h) JoEllen Storch, Psychological Examiner.

14. Petitioners' exhibits P-1 through P-3 were offered collectively as Respondent's exhibit R-47 and admitted into the record. Respondent's waived any objections to these exhibits. (T. 160-62**)**

15. Respondent's exhibits R-1 through R-48 were admitted into the record.

ISSUES RAISED FOR THE PANEL'S CONSIDERATION

16. Petitioner raised several issues in her initial request for a due process hearing (January 19, 2005) and her revised due process request (March 9, 2005). Some issues were repetitive of other issues raised. Other issues sought relief beyond the scope or authority of the Panel to provide. Therefore, for efficiency purposes, the Panel determined at the outset of the hearing that the following nine (9) issues were properly raised for consideration. Those issues are:

a) Petitioner's request for a different placement for the minor child, including consideration of a less restrictive environment and/or moving the minor child to a different school;

b) Petitioner's request that a mentor or tutor be assigned to assist the minor child with organizational matters;

c) Petitioner's request that Bowling Green provide an earlier bus (or other transportation) for minor child;

d) Petitioner's request for a "safe person" to be assigned to the minor child to assist with behavior issues that could lead to the imposition of discipline;

e) Bowling Green's failure to provide adequate notice of action with respect to services provided or denied the minor child, as well as Bowling Green's failure to provide any notice of action for an incident on January 24th;

f) Petitioner's assertion that an undocumented IEP was implemented with respect to the minor child;

g) Bowling Green's adherence or failure to adhere to accommodations

agreed to with respect to school assignments for the 2004-2005 school year;

h) Petitioner's assertion that Bowling Green should have provided extended year services; and

i) Petitioner's challenge to conduct manifestation determinations.

FINDINGS OF FACT

17. The minor child is _____ _____, born on _____ ____, _____. At the time of the hearing, he was 15 years old.

18. The minor child resides with his mother, _____ _____.

19. The minor child resided in and attended the Bowling Green School District from August 2002 through the summer of 2005. However, during portions of the 2004-2005 school year, the minor child fell outside the jurisdiction of Bowling Green for educational services. (Tr. 44.)

20. Prior to attending Bowling Green, the minor child was enrolled in the Wentzville School District and attended school there from 1995 until his transfer to Bowling Green in August 2002. (Tr. 44; Ex. R-1; R-39 at p. 316)

21. At Wentzville, the minor child did not first begin receiving special education services until December 11, 1998, at which time Wentzville identified the minor child as a student with a speech disability and began receiving speech therapy services. (Ex. R-1 at p. 1; R-39 at p. 316-17)

22. During the 2000-2001 school year at Wentzville, the minor child underwent a Re-evaluation staffing on February 13, 2001 and March 20, 2001. (R-2 at p. 39)

23. The Evaluation Summary Report from the second Re-evaluation staffing

determined that the minor child was showing adequate development in the areas of general health, vision, hearing, intellectual development, speech, language, academic achievement (ability), social/emotional/behavioral development, and fine and gross motor skills. (R-2 at p.42)

24. The Evaluation Summary Report also determined that the minor child had a documented health impairment of Attention Deficit Hyperactivity Disorder (ADHD) as diagnosed by the child's physician Dr. Muntaz.[1]

25. The health impairment was found to adversely affect his educational performance. Therefore, the Diagnostic Team determined that he met the eligibility criteria for the educational diagnosis of Other Health Impairment (OHI). (Ex. R-2)

26. During the same school year, Wentzville removed the diagnosis of speech disordered due to the Diagnostic Team's determination that he was able to correct his articulation error in the classroom setting. (Ex. R-2 at p. 36, 42-43; R-39 at 317)

27. Academic records from Wentzville indicate that the minor child obtained average to above average grades through the fourth grade. During his fifth grade year, his grades began to fall to below average in several areas. (Ex. R-39 at p. 316; R-12 at p. 109)

28. In August 2002, the minor child enrolled as a student at Bowling Green.[2]

29. At that time, the minor child was under an Individual Education Program (IEP) implemented by Wentzville on or about May 3 2002.

30. The May 2002 IEP noted that his current placement was "modified regular education." He had one resource class and was monitored by a speech pathologist. Planning priorities in the Present Level of Performance (PLP) section of the IEP included "maintaining the

[1] The record shows that the ADHD diagnosis occurred prior to the February/March 2001 Re-Evaluation, possibly as early as February 1998. See Tr. 163. However, the Panel is unable to say with reasonable certainty the exact date this diagnosis was first made.

[2] At the time in question the Bowling Green School District had approximately 1650 students enrolled of which

least restrictive environment" and continuing a plan to teach the child "personal accountability for his actions." (Ex. R-1)

31. The May 2002 IEP contained four (4) annual goals and eight (8) short-term objectives. The annual goals were:

a) Begin tasks within 2 minutes of direction given by May 2003;

b) Increase time on tasks to 20 minutes by May 2003;

c) _____ _____ will take responsibility for his actions and accept the consequences 4/5 times by May 2003; and

d) _____ _____ will turn in 100% of his assignments within 2 days of the due date by May 2003.

32. At the time of the May 2002 IEP, the minor child was a twelve-year-old seventh grader. (Ex. R-1)

33. Upon his transfer to Bowling Green, Wentzville sent his May 2002 IEPs, evaluation reports from 2001 and 2002, and his discipline records from sixth and seventh grade. (Tr. 425; E. R-1)

34. Following its transfer procedures, Bowling Green reviewed the "transfer IEP" to determine if the Wentzville IEP is acceptable in its entirety or if it needs to be rewritten. (Tr. 425-26)

35. In this instance, the educational record for the minor child shows that the district accepted the Wentzville evaluation reports, including the then current educational diagnosis of OHI for the minor child, but rejected the Wentzville IEP. (Tr. 425-27, 560, 562; R. Ex-3 at p. 45)

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235 students were on IEP's.

36. On or about August 20, 2002, Bowling Green convened its own IEP team for the minor child for the purpose of developing a new IEP for the child. (Ex. R-2 at 34; Ex. R-3 at 44; Tr. 426, 428, 641)

37. The Mother was present at the meeting, for the IEP developed at this meeting and consented to the placement ultimately obtained for the minor child. (Ex. R-2 at p.34, 54)

38. The August 2002 IEP team consisted of the Mother, Cindy North (LEA Representative and School Counselor), Earnest Givens (Special Education teacher) and Diane Kilpatrick (Regular Classroom Teacher). (Ex. R-2)

39. The August 2002 IEP included a PLP that was substantially based on the earlier Wentzville IEP of May 2002. The PLP noted that the minor child "appeared to adequate academic ability," but experienced academic difficulties in completing class assignments and in using his time outside of school wisely.[3] (Ex. R-3 at 45)

40. The PLP also accepted the 2001 Re-evaluation staffing performed by Wentzville. (Ex. R-3)

41. The August 2002 IEP contained one (1) annual goal and three short-term objectives. The annual goal called for the minor child to "maintain a passing grade in all courses through the next year." The three (3) short-term objectives related to assignment completion. (Ex. R-3 at 47)

42. At the hearing, the Mother testified that this annual goal was an important goal for her son. (Tr. 64-65)

43. The Mother also testified that she did not request any changes to the annual goal or the three related short-term objectives. (Tr. 65)

[3] This determination was made despite the fact that the IEP team did not have information about his past performance on the Missouri Academic Performance (MAP) test.

44. The August 2002 IEP provided for 225 minutes per week in special education instruction and for 1575 minutes per week in regular education instruction. The IEP also provided for the following accommodations and/or modifications: preferential seating and extended time on assignments.[4] (Ex. R-3 at 48; Tr. 65, 430-31)

45. The August 2002 IEP also stated that the minor child was expected to follow the District's regular discipline policy. (Ex. R-3 at 48)

46. At the conclusion of the August 20, 2002, IEP meeting, the Mother was provided with written notice of action regarding the proposed IEP placement. The Mother consented to the actions proposed. (Ex. R-3 at 53-54; Tr. 66-67, 431)

47. During the 2002-03 school year, the educational record shows that the minor child made some progress on his annual goal and short-term objectives. The educational record also indicates that the minor child obtained varied grades (ranging from As to Ds, with two Fs), as well as several disciplinary referrals for a myriad of reasons. (Ex. R-3, 41, 43)

48. On or about December 18, 2002, the Mother telephoned Bowling Green to request an IEP meeting. The Mother was subsequently informed that such a meeting would not be possible until after the Christmas vacation. (Ex. R-4)

49. In April 2003, Bowling Green sent the Mother written notification for an IEP meeting on April 11, 2003. The record contains no explanation as to why the school district waited three and one-half months to convene an IEP meeting from the date of the Mother's request.[5]

50. On or about April 24, 2003, Bowling Green provided the Mother with a second

[4] In contrast, the Wentzville IEP of May 2002 provided for 250 minutes of special education instruction and 1775 minutes of regular education instruction. The record lacks sufficient certainty to explain the change in these service amounts by Bowling Green.

[5] The delay was not specifically raised as an issue in Petitioner's request for due process hearing.

notification for an IEP meeting for May 2, 2003. The Mother attended the meeting on May 2nd, but requested a postponement. Bowling Green agreed and the meeting was rescheduled. (Ex. R-5 at 56-57, Tr. 431)

51. The IEP team next convened on May 19, 2003. The Mother was present for and participated in the meeting, which extended into May 20th.

52. At the May 19th meeting, the Mother presented a letter to the IEP team regarding the IEP and a manifestation determination to be held with respect to a May 8 incident[6] of fighting involving the minor child. (Ex. R-6 at 60)

53. In that letter, the Mother presented a list of concerns for the IEP team to consider in formulating the student's new IEP. Those concerns listed were: a behavior support plan, a functional behavioral assessment, counseling, an extra set of books, and racial slurs and diversity training. (Ex. R-6, R-7; Tr. 76-78, 81-82, 87, 434-36)

54. The May IEP meeting lasted over two days in order to give the IEP team members time to consider and address the Mother's list of concerns.

55. At the May IEP meeting, the team reviewed and revised the minor child's IEP. (Ex. R-7 at 61; Tr. 436)

56. The PLP section of the May 2003 IEP noted that the minor child had a medical diagnosis of ADHD, that he communicated readily, was social and had friends. The PLP stated the minor child operated "at a slower pace" than non-disabled students, was "sometimes off-task" and on occasion needed assistance. Because of these challenges -- particularly his work at a slower pace -- he needed extended time to complete assignments. The PLP also noted that he had shown growth in assignment completion since his August 2002 IEP, but he still does not

[6] On May 8, 2003, the minor child was referred for discipline as a result of fighting with another student, and suspended for five days. The occurrence was one of four incidents involving the minor child "fighting/hitting" that

keep track of his assignments. (Ex. R-7 at 62)

57. The May 2003 IEP determined the minor child did not have behaviors that impeded his learning.[7] (Ex. R-7 at 63)

58. The May 2003 IEP contained one annual goal – maintaining at least a "C" average in his regular education classes – and three related short-term objectives. The IEP also included the following accommodations and modifications: preferential seating, extended time for assignments, reduced distractions, an extra set of books for home use[8], and reduced or adapted class work as appropriate. (Ex. R-7 at 64-65)

59. At the hearing, testimony was presented indicating the Mother did not object to annual goal and objectives formulated under the May 2003 IEP or the accommodations and modifications implemented. (Tr. 88-92, 439-441)

60. The May 2003 IEP maintained the same amount of special education minutes as the August 2002 IEP. (Ex. R-7 at 65)

61. On May 19, 2003, the IEP team conducted a functional behavioral assessment regarding the fighting incident of the May 8th.[9] (Ex. R-7 at 74)

62. On May 20, 2003, the IEP team conducted a manifestation determination regarding the fighting incident and concluded that the behavior did not appear related to the minor child's educational diagnosis of OHI. The Mother refused to support this conclusion.

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brought about disciplinary action (Ex. R-7 at 74)

[7] One illustration of this point is the testimony of Tom Griggsby, one of minor child's regular education teachers during the 2003-04 and part of the 2004-05 school year. Mr. Griggsby was the minor child' language arts teacher during the 2003-04 school year. During the 2003-04 school year, the minor child passed the first semester of the class, but failed the second semester. The failing grade was based, in part, on the minor child' failure to finish the major research project that was due and failure to turn in homework. The minor child returned to Mr. Griggsby's class during the last two weeks of May 2005 upon his return from the residential rehabilitation placement. (Tr. 534-38)

[8] This item was on the Mother's list of concerns.

[9] A functional Behavioral Assessment is designed, in part, to assist school personnel to get a better handle on how to assist a student to have improved behavior. (Tr. 501)

(Ex. R-7 at 72-73; Tr. 447-48)

63. On May 20th, the Mother presented a second letter of concerns in which she requested a behavior intervention plan[10], a behavior support plan and a functional behavioral assessment, counseling, additional supervision, an extra set of books, extended school year, and diversity training. The second list of concerns was similar, but not identical, to the earlier list of concerns. (Ex. R-7 at 79, R-6 at 60)

64. On or about May 22, 2003, Bowling Green sent a Notice of Action to the Mother informing her the school district was refusing her requests for a behavior support plan, extended school year and individual counseling.[11] The Notice of Action included the school district's reasoning for the denying the requests. (Ex. R-7 at 80)

65. In addition, the Notice of Action also indicated that certain issues, such as supervision and racial issues, should be addressed outside of the IEP meeting and with building administrators. (Ex. R-7 at 80; Tr. 91, 453)

66. The May 2003 IEP as finally developed and implemented offered the minor child a free appropriate public education in the least restrictive environment as required under the IDEA.

67. During the 2003-04 school year, the minor child attended the Bowling Green High School as a ninth grader. (Tr. 92)

68. During the 2003-04, Jane Bell was assigned as the minor child's special education teacher.[12] Ms. Bell testified the minor child attended her study skills class every other day under Bowling Green's block scheduling system. In that class, Ms. Bell assisted the minor child with

[10] The Mother included tardiness, organizational skills and social skills as behavior that impedes learning. (Ex. R-7 at 79)
[11] At hearing, the Mother stated that she did not recall getting that notice of action. (Tr. 90-91)
[12] Ms. Bell was also his special education teach for the 2004-2005 school year.

homework and organization skills, and implemented the IEP goal and objectives. (Tr. 857-61, 874)

69. Ms. Bell testified that goals and objectives included in the May 2003 IEP were appropriate for the minor child. Ms. Bell also indicated that the IEPs and placements offered to him provided the student a free appropriate public education in the least restrictive environment.[13] (Tr. 883)

70. Ms. Bell also served as the minor child's case manager. In that capacity, she informed his regular education teachers and the assistant principal of their responsibilities to implement the accommodations and modifications of the IEPs as well as the behavior plan. Ms. Bell also monitored those teachers' classrooms to ensure that those components of the IEP were being consistently implemented. (Tr. 859-61)

71. During the 2003-04 school year, the minor child made some progress with respect to his IEP goals and objectives. He again had numerous disciplinary referrals, but fewer than while at Wentzville. (Ex. R-41 at 387; R-48) Ex. R-43 at 414.

72. On or about October 13, 2003, Pat Adams,[14] a licensed professional counselor, corresponded with Lisa Helm regarding the minor child. (Ex. R-8 at 84)

73. In her letter, Ms. Adams set forth her impressions and input for the IEP team's benefit towards the minor child's upcoming IEP. Ms. Adams impressions included that he was talented in art and liked working with his hands, that when a subject interests him he is animated with his hands and that if bored (or thinks he is in trouble) he shuts down and "is slower with his responses and acts dumb." She indicated that he is easily led by his peers, particularly those who

[13] Bowling Green also relied upon Quarterly Progress Reports as another measurement that the minor child was making progress on his IEP goals and objectives.

[14] Ms. Adams had provided counseling to the minor child and his Mother since June 23, 2003. (Ex. R-8)

tell him its okay to break rules and do things that will get him in trouble. She also noted that he tends to leap into things before thinking it through because of his ADDH[15] and his poor impulse control.

74. Ms. Adams believed that motivating the minor child to try harder and avoid the pitfalls of peer pressure are real challenges for him. However, she believed that a real support system, offered by the school district, would improve his chances at overcoming these challenges. Ms. Adams recommended making a counselor available to the minor child at school, assigning a buddy system of an older student to mentor him, building an anger management factor into his IEP and offering immediate rewards for positive and compliant behavior. (Ex. R. 8)

75. The IEP team convened in response to Ms. Adams' letter on or about October 29, 2003, and prepared a revised IEP. Among the individuals participating in the meeting were the minor child, the Minor Child, Jane Bell, Lisa Helm, and regular education teachers Stacy Bibb and Michelle Bramblett.[16] (Ex. R-9 at 85; Tr. 92, 453-57)

76. At the October 2003 IEP meeting, the PLP, special considerations factors, goals and objectives and services in the new IEP remained the same as in the prior IEP. Based on the record before the Panel, the Mother did not request any changes to the IEP goal and objectives. (Ex. R-9 at 86-89; Tr. 457, 460)

77 The team modified the IEP by including some additional modifications such as an assignment sheet and the need for the minor child to remind teachers that he needed to leave class a minute early. The team agreed to have the minor child remind his teachers as a way for

[15] The terms "ADDH" and "ADHD" are interchangeable for this dispute.

[16] The Mother apparently would call for IEP meetings at the issuance of quarter grades and would request that all regular education teachers attend. The school district appears to have compiled with these requests and would make reasonable efforts, when appropriate, to have some or all of the student's teachers attend. It is Bowling Green's

him to learn to take responsibility. The team did not change the minor child' placement. (Ex. R-9 at 89; Tr. 92-94; 458-59)

78. In January 2004, JoEllen Storch, Bowling Green's psychological examiner, began gathering information about the minor child in preparation for a required three-year reevaluation. (Tr. 460-61, 951)

79. On or about January 23, 2004, Ms. Storch corresponded with the Mother regarding the reevaluation and provided her with a written notification for a meeting on February 20 to review existing data and to review The minor child' IEP. (Ex. R-11 at 99; R-12 at 100; Tr. 461, 951-52)

80. On or about February 13, 2004, the minor child was suspended from school for 10 days due to possession of a controlled substance. Kent Hufty, the high school principal, sent written notice of the suspension to the Mother and informed her the incident would be reported to the police. (Ex. R-14 at 130)

81. On February 20, 2004, the minor child' IEP team convened to discuss the three-year reevaluation. The following were among those participating: the Mother, Lisa Helm and JoEllen Storch. The Mother participated in the meeting. (Ex. R-12 at 101; Tr. 95-96, 461, 466, 952-55)

82. At this IEP meeting, the Mother expressed concerns about her son's motor skills and was informed that a doctor's order for an occupational therapy ("OT") evaluation would be necessary before Bowling Green could initiate an OT evaluation.[17] (Ex. R-12 at 101, Tr. 958)

83. At this IEP meeting, the IEP team prepared a reevaluation report. The report

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position, however, that the IDEA did not require the presence of all teachers at an IEP team. Tr. 455-56.

[17] The Mother indicated that she would obtain the necessary medical authorization, but there is not basis in the record to indicate that she actually obtained it.

includes a review of existing data, including a review of the Wentzville evaluation reports, Bowling Green school observations, and other information. With respect to the Mother's concerns about motor skills, the report relies upon an observation (conducted January 19, 2004) to conclude that there were no concerns about the minor child' motor abilities. The observation, however, did note that the minor child was very slow in performing many physical tasks. (Ex. R-12 at 102, 104)

84. The report also notes that the Mother reported that she was getting eyeglasses for the minor child. The report includes a review of his grades from kindergarten through ninth grade as well as his MAP test scores. At the conclusion of the meeting, the team concluded that no assessment was necessary for the three-year reevaluation and that sufficient information existed upon which to continue the diagnosis of OHI. The Mother refused to sign agreement with the team's conclusions. (Ex. R-12 at 109-110, 115; Tr. 466-67, 952-53, 955-56)

85. At the February IEP meeting, the Mother expressed concerns about her son's placement and the team discussed the possibility of attending Bowling Green's alternative high school, including the necessary application process for that school. (Ex. R-12 at 101; Tr. 96-97, 461-62)

86. Ms. Helm testified that the alternative high school is for credit recovery and only juniors and seniors generally are placed there because they are the students lacking credits for graduation. At that time, the minor child was in the second semester of his freshman year and was not lacking any credits. However, had The minor child been accepted and his IEP resource time continued, that acceptance would not have constituted a change in The minor child' educational placement under the IDEA because it is considered a regular education placement.[18]

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[18] Bowling Green officials testified that the Minor Child did not submit an application at that time.

Tr. 462-65.

87. The IEP team did not review or revise the minor child's IEP on February 20 because the Mother wanted to wait until he could be present for the meeting.[19] The team agreed to postpone the meeting until such time as the Minor Child could attend (Ex. R-12 at 101; Tr. 465)

88. On or about March 1, 2004, the Mother sent a written request to the school district asking it to reevaluate the minor child in all areas and, in addition, requesting "another evaluation to include Mental Ability synopsis." (Ex. R-13 at 127; Tr. 469-70)

89. On March 1, the Mother also provided Bowling Green with a signed copy of the reevaluation form that she previously had refused to sign. On that form, she checked almost all areas as those where she was seeking an evaluation. At hearing, Ms. Storch testified that the form did not reflect the IEP team's discussion or decision. (Ex. R-13 at 129; Tr. 470, 959)

90. On March 5, 2004, the minor child' IEP team convened to review and revise his IEP and to conduct a manifestation determination. Among those participating in the meeting were the Mother, the minor child, Lisa Helm, Jane Bell, and four regular education teachers.[20] (Ex. R-15 at 133; Tr. 102, 471-72, 478)

91. The PLP section of the IEP notes that the minor child continued to operate at a slower pace and continued to often be off task and needed prompting to return to work. However. The PLP noted that he could comprehend easily when he applied himself. (Ex. R-15 at 134)

92. The PLP further notes that extra time was allowed for a keyboarding class during

[19] At that time, the minor child was in the custody of the Division of Youth Services until his scheduled release on February 27th.

[20] It was unusual for the District to have four regular education teachers present at an IEP meeting. Tr. 472. The District did so at her request. Tr. 472.

his study skills class, but that was discontinued because of behavior issues. However, Bowling Green did allowed additional time at the computer labs before and after school but the minor child chose not to utilize the opportunity. The PLP also notes scores of step 3 in Math and Step 4 in Social Studies on his MAP test, an indication that the minor child could be successful academically.[21] Finally, the PLP notes the minor child was receiving counseling as determined by the counselor. (Ex. R-15 at 132-6; Tr. 105, 479)

93. The March 2004 IEP contained one annual goal of passing all academic classes with a 75% or better average and includes four short-term objectives related to bringing his books and supplies, staying on task, homework completion and organizational skills. At the hearing, the Mother testified that this goal remained important. There was also uncontradicted testimony that the Mother did not request any changes to the annual goal or the objectives at the March 2004 meeting. (Ex. R-15 at 136; Tr. 106-07, 480)

94. The March 2004 IEP did contain revisions to the accommodations and modifications provided the minor child. The IEP team omitted the second set of books and assignment sheet, and added a modification for extra time in special education to complete work when the minor child worked to his ability during class. An accommodation was also added of a clue on the desk to remind the minor child to leave class early and a weekly report for the parent to pick up regarding missed assignments, grades and behavioral concerns. The IEP continued the placement of 225 minutes per week in special education. The IEP team also prepared an additional functional behavioral assessment in preparation for the development of a behavior intervention plan (Ex. R-15 at 137, 144-49; Tr. 108-14, 485-88, 491)

95. At the time, the placement provided by Bowling Green constituted the least restrictive environment for the minor child.

[21] Accommodations on the MAP test were permitted due to his disability. (Tr. 479-80)

96. On March 5, the IEP team also received a letter from the Mother requesting various services such as: a teacher for the home, a more defined behavioral support plan, more counseling, a mentor, grades picked up on Fridays, and notice of failing grades. The team agreed to add some of those requests to the IEP. (Ex. R-15 at 149; Tr. 491-93)

97. The mother also expressed concern about racial harassment. (Ex. R-15 at 149)

98. The parent concerns as expressed in the letter were added in the present level of the IEP. (Ex. R-15 at 149)

99. On March 5, 2004, the District prepared a Notice of Action refusing the Mother 's March 1 request for a reevaluation on the grounds that sufficient information was present to determine eligibility and programming.[22] (Ex. R-15 at 150; Tr. 494-95)

100. On March 16, 2004, the Mother again corresponded with Bowling Green, wherein she reiterated the concerns and requests previously communicated by letter.

101. On or about April 8, 2004, the minor child's took the STAR reading test. The STAR is a computerized reading test that generates grade equivalency scores. Students, who take the test independently, are required to read passages and answer multiple choice questions about that passage. The minor child tested at a 7.3 grade equivalency level in reading.[23] (Ex. R-18 at 154; Tr. 497-99)

102. On April 13, 2004, the minor child was suspended for three days due to inappropriate behavior during an in-school suspension. Bowling Green also conducted an additional functional behavioral assessment of the minor child. (Ex. R-20 at 157, 159; Tr. 116,

[22] In the second March 1st letter, the Mother requested a due process hearing. The record shows that on March 5th Lisa Helm corresponded with the Mother regarding this request and her of the IDEA procedural safeguards and how to file such a hearing under IDEA. The Mother did not file an IDEA due process request at the time nor did she file a grievance. (Ex. R-16 at 151; Tr. 495-96)

[23] In October 2004, on an additional administration of the STAR, the minor child scored at a 12.9 grade equivalent level. Tr. 499.

501).

103. On April 14, 2004, the District provided the Mother with a written notification for an IEP meeting for April 20 to review and revise the minor child' IEP, to conduct a functional behavioral assessment, and to consider a behavior plan. The meeting was convened at the request of the Mother. (Ex. R-21 at 160, 162; Tr. 501-04)

104. On April 20, 2004, the IEP team met. The participants included the Mother, the minor child, Lisa Helm, Jane Bell, and several regular education teachers. At the meeting, the Mother presented a letter expressing several her concerns. The IEP team had previously addressed many of the concerns. (Ex. R-21 at 162, 165; Tr. 117-19, 503-04)

105. On April 27, 2004, the minor child' IEP team met again and finalized a behavior intervention plan that was attached to the March 2004 IEP. Ex. R-15 at 143; Tr. 488-89, 504-05, 648-49.

106. The behavior plan indicates, that the minor child would be given two warnings before being sent to the office and that the Mother would be notified by the assistant principal and given a chance to intervene. The April 2004 behavior plan also provides for positive interventions to be used to reward the minor child for positive behavior. (Ex. R-15 at 143; Tr. 651-54)

107. At the hearing, Lisa Helm testified that the behavior plan did not contemplate that the Mother would be given an opportunity to determine the consequences for her son's behavior in the event that the assistant principal became involved. Rather, the idea was to allow the Mother to intervene to assist the minor child in calming or decreasing a behavior at a particular time. (Tr. 654, 490-91, 863-64)

108. During the 2004-05 school year, the minor child attended Bowling Green for a

portion of the year as tenth grader. On two occasions, he was placed in residential treatment centers. During the time he was in residential treatment, Bowling Green was unable to implement the IEP. (Ex. R-39 at 318; R-44; Tr. 508-11)

109. During the first semester of the 2004-05 school year, he continued to have disciplinary referrals. (Ex. R-43 at 416)

110. On October 11, 2004, the District provided the Mother with a written notification for an IEP meeting for October 19, 2004. (Ex. R-23 at 171; Tr. 505)

111. On October 13, 2004, the minor child took the STAR reading test, at which time he scored at a 12.9 grade equivalency level. (Ex. R-24 at 173; Tr. 764-65)

112. On October 19, 2004, the team met at the Mother's request to discuss grades and disruptions. The team discussed the minor child' grades and his work. The team also discussed that the minor child did not turn in work and that impacted his grades. The team discussed the possibility of extended school year ("ESY") and noted that ESY had been addressed in March 2004. Because the team did not agree to any revisions of the IEP, no new IEP document was generated. (Tr. 129-30, 506)[24]

113. The Mother presented another letter expressing her concerns at the October 19 meeting. (Ex. R-24 at 176; Tr. 120, 506-07)

114. On October 22, 2004, Jane Bell compiled a list of all the adaptations that his teachers were providing and sent that list to the Mother. (Ex. R-25 at 179; Tr. 120, 507-08)

115. In late December 2004, the minor child was placed by his Mother at Preferred Family Health Care in Kirksville, Missouri in a residential drug rehabilitation program. He attended PFHC from December 23, 2004 through January 14, 2005. (Tr. 121-22, 509; Ex. R-44

[24] The Panel believes this meeting may be alleged " undocumented or unrecorded IEP" which the Petitioner raises as an issue for consideration.

at 420)

116. On December 17, 2004, Bowling Green provided the Mother with a written notification for an IEP meeting on January 10, 2005 to discuss placement and modifications. (Ex. R-26 at 181)

117. The meeting was rescheduled for January 24th due to the Mother's demand that all teachings giving the minor child a failing grade attend. At that time, Bowling Green knew the minor child would be returning from Kirksville, but did not know when.

118. On January 10, 2005, Bowling Green received a letter from Paula Brawner of PFHC informing the school district that The minor child would be in residential placement for 30-60 days and that, while there, he would be enrolled in the Kirksville School District. The letter advised Bowling Green to disenroll him effective December 23, 2004 (Ex. R-27 at 183; Tr. 509)

119. On January 16, 2005, Laurie Waddle with PFHC corresponded with the District. Ms. Waddle communicated that the minor child had been placed in a residential drug and alcohol treatment center for the preceding three weeks. However, because he had made only minimal progress on substance abuse issues and because of his behavior at PFHC, the minor child was discharged from the program. (Ex. R-27 at 185, R-32 at 213; Tr. 326-27, 513)

120. Around this same time, the Bowling Green also became aware that the minor child had been placed on informal probation due to a positive drug test. (Tr. 327)

121. The minor child returned to Bowling Green on January 18, 2005, but was suspended for five days from January 19-25 for a bus incident.[25] (Ex. R-44 at 420; R-39 at 318; Ex. R-28 at 189; Tr. 123, 509, 511, 513-14, 660-662)

[25] The minor child and another student were involved in an altercation. The Mother and the minor child believe the alteration denotes racial harassment and/or discrimination.

122. On January 19, 2005, the Mother filed a request for a due process hearing with the Missouri Department of Elementary and Secondary Education. (Ex. R-29 at 191)

123. The minor child attended Bowling Green on January 26-28, 2005, and then was absent from February 1 through 10, 2005.

124. On or about January 19, 2005, the District provided the Mother with a notification for an IEP meeting for January 24, 2005 to review and revise the IEP, consider a functional behavioral assessment, review the behavior plan and consider placement. (Ex. R-31)

125. The IEP team met on January 24, 2005. At the meeting, Lisa Helm informed the Mother that certain issues raised would need to be addressed through the due process procedures. (Ex. R-31 at 196; Tr. 513-16)

126. On January 24, 2005, the IEP team prepared a new IEP based on the team discussion of that date. Among those who attended and participated were the Mother, the minor child, Lisa Helm, Jane Bell, the principal and assistant principal, and several regular education teachers. The IEP included an annual goal regarding passing academic work and objectives relating to bringing supplies and books to class, staying on task, completing assigned homework and organizational skills.[26] The IEP contains several modifications for regular education and provides for a list of individual teacher adaptations. The IEP continued the same placement of 225 minutes per week in special education and continued the behavior intervention plan with an additional provision providing for Him to sit in an assigned seat at lunch. (Ex. R-31)

127. The January 2005 IEP offered the minor child FAPE in the least restrictive environment.

128. On that same date, an additional functional behavioral assessment was conducted

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[26] The annual goal and short-term objectives were similar to prior IEPs.

regarding the January 18 bus incident. (Ex. R-31 at 210)

129. The minor child ran away from home and was truant from school on February 7-10, 2005. (Tr. 123)

130. The Mother subsequently contacted the police and the Division of Family Services became involved. (Tr. 123)

131. The minor child was placed in juvenile detention on February 10, 2005 and remained there through February 28, 2005. He was then placed by the Division of Youth Services and through the court in PFHC in St. Charles, Missouri on March 1, 2005, for drug and alcohol treatment. (Ex. R- 44; R-39 at 318; Tr. 123-24)

132. On or about March 17, 2005, the Frances Howell School District developed an IEP for the minor child while he attended the PFHC (St. Charles) as a residential patient. During that time, he was enrolled as a student in the Frances Howell School District and was not a Bowling Green student.

133. On or about April 17, 2005, Tim Taylor, a licensed professional counselor, corresponded with Brenda Eskew, a District counselor. Mr. Taylor noted that the minor child had been referred to counseling with him because of chronic academic and behavioral problems. When the minor child was at PFHC, Mr. Taylor ceased counseling because of the duplication of services. (Ex. R-34 at 220; Tr. 256)

134. Mr. Taylor testified on the District's behalf at the hearing. Mr. Taylor is a licensed professional counselor at Evergreen Behavioral Services in Mexico, Missouri. As an LPC, Mr. Taylor is authorized to provide mental health counseling, including assessment, diagnosis and treatment of individuals with mental health and emotional issues. (Tr. 244-45)

135. During the 2003-04 school year, Mr. Taylor provided some counseling to him.

That counseling was not provided as an IEP service and Mr. Taylor had parental consent to begin. Mr. Taylor provided six counseling sessions to him during the first half of the 2004-05 school year. He ceased providing counseling in November 2004 because, at that time, the minor child began seeing other counselors for drug and alcohol issues. During those sessions, he was able to pay attention and to follow the conversation. Taylor stated that he did not observe a condition that would prevent the minor child from conforming to behavioral expectations at school. (Tr. 246, 248, 255, 271, 442)

136. Mr. Taylor is qualified to diagnose ADHD pursuant to the DSM-IV and was aware that he had a medical diagnosis of ADHD. During the counseling sessions, Mr. Taylor did not observe that the minor child presented with symptoms of ADHD.[27] Tr. 248.

137. Mr. Taylor testified that the presenting symptoms of ADHD usually – but not always -- consist of distractibility, difficulty paying attention, losing things, and not being organized. With hyperactivity, an individual displays restlessness, fidgeting, and squirming. Tr. Mr. Taylor observed him to be "very laid back," personable and very easy to engage in conversation. (Tr. 248-50)

138. Mr. Taylor testified that not all of his behavioral incidents were the result of the ADHD. According to Mr. Taylor, making poor decisions is not necessarily the result of having ADHD. Moreover, the ADHD did not prevent him from taking responsibility for his behaviors. (Tr. 251-54)

139. Mr. Taylor noted that if the minor child believed that he did not have to take responsibility for his behavior that he would continue to engage in inappropriate behavior.[28] Tr.

[27] Mr. Taylor, however, did not formally assess him and was not asked to provide a diagnosis as part of his treatment services. Thus, the Panel does not find his testimony alone sufficient to invalidate the medical diagnosis of ADHD.

[28] Likewise, in his letter, Mr. Taylor indicated that one troubling aspect of the minor child's personality was that he

254.

140. On or about April 26, 2005, Bowling Green received additional information regarding the minor child from the Wentzville School District. The additional documents showed that the Mother complained about similar racial harassment at Wentzville as she did at Bowling Green, and requested many of the same accommodations and expressed many of the same concerns expressed at Bowling Green. (Ex. R-35; Tr. 519-20, 953-54)

141. The Mother selected Dr. Judith Tindall, a psychologist, to conduct an independent evaluation of the minor child. On or about May 2, 2005, Dr. Tindall submitted her evaluation report to Bowling Green. The evaluation contained eight recommendations. Dr. Tindall did not testify at the due process hearing. (Ex. R-36 at 281; Tr. 520-21)

142. At the time that Dr. Tindall evaluated the minor child, he was attending FPHC (St. Charles).

143. Bowling Green placed little weight on Dr. Tindall's evaluation because in the school district's opinion inaccurate scores were reported by Dr. Tindall and she misinterpreted the scores in her assessment.

144. The minor child reenrolled in the Bowling Green High School on May 4, 2005.

145. On or about May 17, 2005, the IEP team met to consider his current placement and status. The team met for over six hours. Based on all testing conducted, the team concluded that his diagnosis of OHI, based on a diagnosis of ADHD, should be continued. (Ex. R-39 at 362; Tr. 527)

146. The team agreed with the evaluation report assessment that the OHI impacted the minor child in the areas of task focus, organizational skills, and work completion. The team also

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did not learn from consequences that had been imposed.

concluded, however, that he exhibited behaviors that were not the result of his OHI including his refusal to follow teacher directions, his disregard of school rules, his dress code violations, his failing grades that resulted from lack of effort, his sleeping in class, his frequent absences and tardies, his arguing and complaining, his taunting of other students, his fighting and drug and alcohol use, his lying and stealing. The team characterized those behaviors as the result of a social maladjustment and not an emotional disturbance or other health impairment. (Ex. R-39 at 362; Tr. 527, 985)

147. The following were among the participants in the meeting: the Mother, the minor child, Lisa Helm, JoEllen Storch, Jane Bell, and the Mother's advocates, Gail Altman and attorney Larry Altman.

148. On that same date, the IEP team developed a new IEP for based on the results of the reevaluation. The IEP was not implemented because of the stay-put resulting from the due process filing. (Ex. R-40; Tr. 425-26, 528)

CONCLUSIONS OF LAW

Jurisdiction

This matter arises under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* ("IDEA") and Missouri law, § 162.670, RSMo., *et seq.* Pursuant to 20 U.S.C. § 1415 and § 162.961, RSMo, this Hearing Panel has jurisdiction to adjudicate this dispute.

IDEA Requirements

In exchange for federal funding, the IDEA requires states to identify, locate, and evaluate "all children residing in the State who are disabled . . .and who are in need of special education and related services . . .." **20 U.S.C. § 1412(2)(C)** (1994). Participating states and their public

education agencies are obligated to "provide all students with disabilities with free appropriate public education," which is at times referred to as FAPE. ***Breen v. St. Charles R-IV School District***, 2 F. Supp. 2d 1214, 1221 (Mo. E. Dist. 1997). FAPE is defined by federal statute to mean:

> [S]pecial education and related services that –
>
> (A) have been provided at public expense, under public supervision, without charge,
>
> (B) meet the standards of the State educational agency,
>
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and
>
> (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.
>
> **20 U.S.C. § 1401(a)(18);** quoted in, ***Breen***, supra.

Since the IDEA's enactment, several court cases have interpretation the scope and meaning of FAPE. Each new case provides additional insight and guidance to hearing panels called upon to make determination in these types of proceedings. In this case, the Panel is mindful of the holding and guidance set forth by the Supreme Court in ***Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley***, 458 U.S. 176, 206-207 (1982). In ***Rowley***, the court recognized that FAPE is child specific. Therefore, the Individualized Educational Program (IEP), which is the primary means for carrying out the IDEA's goal, must be "tailored to the unique needs of the handicapped child." *Id*. at 181-182.

Rowley is also instructive in that it holds the IDEA does not prescribe any substantive standard regarding the level of education to be accorded to disabled children and does not require "strict equality of opportunity or services." 458 U.S. at 189, 195, 198. Instead, the Local Educational Agency ("LEA") fulfills the requirement of FAPE "by providing personalized

instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id*. at 203.

As stated, the primary vehicle for carrying out the IDEA's goal of personalized instruction is the IEP. See, **20 U.S.C. § 1414**. "The IEP . . .[is] a written document containing '(A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short term objectives, . . . (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.'" ***Rowley*** at 181-182 (citing section 1401(19)). Significantly, an IEP is not required to maximize the educational benefit to the child or to provide each and every service and accommodation that could conceivably be of some educational benefit. ***Rowley*** at 199. Instead, an appropriate education program is one that is "reasonably calculated to enable the child to receive educational benefits." **Rowley**, 458 U.S. at 207; ***Gill v. Columbia 93 Sch. Dist***. 217 F.3d 1027, 1035-36 (8th Cir. 2000).

In articulating the standard for FAPE, the Rowley Court concluded that "Congress did not impose any greater substantive educational standard than would be necessary to make such access meaningful." ***Rowley*** at 192. According to the Court, Congress's intent was "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Id*. Thus, the key question to answer is whether a district is providing FAPE is to assess "whether a proposed IEP is adequate and appropriate for a particular child at a given point in time." ***Burlington v. Dept. of Education***, 736 F.2d 773, 788 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985).

Issues Raised for Consideration

Subsection 3 of section 162.961, RSMo, states that a "parent, guardian or the responsible

educational agency may request a due process hearing by the state board of education with respect to any matter relating to the identification, evaluation, educational placement, or the provision of a free appropriate public education of the child." Here, Petitioner raises the following issues for the Panel's consideration:

a) Petitioner's request for a different placement for the minor child, including consideration of a less restrictive environment and/or moving the minor child to a different school;

b) Petitioner's request that a mentor or tutor be assigned to assist the minor child with organizational matters;

c) Petitioner's request that Bowling Green provide an earlier bus (or other transportation) for minor child;

d) Petitioner's request for a "safe person" to be assigned to the minor child to assist with behavior issues that could lead to the imposition of discipline;

e) Bowling Green's failure to provide adequate notice of action with respect to services provided or denied the minor child, as well as Bowling Green's failure to provide any notice of action for incident on January 24th;

f) Petitioner's assertion that an undocumented IEP was implemented with respect to the minor child;

g) Bowling Green's adherence or failure to adhere to accommodations agreed to with respect to school assignments for the 2004-2005 school year;

h) Petitioner's assertion that Bowling Green should have provided extended year services; and

i) Petitioner's challenge to conduct manifestation determinations.

Bowling Green asserts that most of the issues raised do not relate to identification, evaluation, placement or FAPE. However, parents "must be permitted to bring a complaint about 'any matter relating to' such evaluation and education. ***Rowley*** at 183 (citing §§ 1415(b)(1)(D) and (E)). Bowling Green correctly notes there are limits to the type of matters that are appropriate for adjudication under the IDEA. See generally, ***Highland Park Indep. Sch. District***, 22 IDELR 389 (Tex. SEA Dec 8, 1994); ***Ventura County Office of Educ.***, 508: 129 EHLR (Cal. SEA April 30, 1986). However, in this instance, the Panel finds sufficient basis for the consideration and determination of the issues raised – even if the relationship of certain of issues to the IDEA is attenuated. To find otherwise would thwart the IDEA's effort "to maximize parental involvement in the education of each handicapped child." ***Rowley*** at 183, n6.

Panel's Determinations of Petitioner's Issues

A. Petitioner's Request for Different Placement.

Upon transfer to Bowling Green in August 2002, the minor child was under a May 2002 IEP implemented by the Wentzville School District. That IEP provided for 250 minutes of special education instruction and 1775 minutes of regular education instruction. The May 2002 IEP was rejected by Bowling Green consistent with its understanding of Missouri law and regulation. Bowling Green then set about to implement a new IEP for the minor child. As denoted in the Findings of Fact, above, Bowling Green convened its own IEP tem in August 2002. Petitioner was a member of that IEP team. The team chose to accept the evaluation reports generated from Wentzville, including the then current educational diagnosis of OHI for the minor child. (Tr. 425-27, 560, 562; Ex. R-3 at 44) The team formulated a new IEP for the minor child, the August 2002 IEP, which included one annual goal and three short-term

objectives. The August 2002 IEP provided for 225 minutes per week in special education instruction and 1575 minutes of regular education instruction. While the record does not provide sufficient explanation for why the service minutes were reduced for special education or why only one goal was formed, the record is clear that Petitioner was present for the IEP meeting, was aware of the services to be provided, and consented to the initiation of those services. The record presented to the Panel contains no basis for finding that the IEP initiated by Bowling Green was inappropriate.[29]

The IEP team next met in May 2003 to review the minor child's IEP. The record shows that proper notice was given to the Mother in advance of the IEP meeting and that the original meeting dates of April 11 and May 2 were postponed at the parent's request. The record does show that the Mother had first requested an IEP team meeting in December 2002. The record contains no explanation as to why there was a three and half month delay. However, the record contains no evidence that the minor child was prejudiced or harmed in any manner by the delay.

At the May 19th and 20th IEP team meeting, the record shows that the Mother participated, that she presented a list of concerns for the team's consideration, and that those concerns were considered and in some cases incorporated into the new IEP that was on May 20, 2003. A Notice of Action was subsequently sent to the Mother informing which concerns were not incorporated into the new IEP and why the district had declined to do so. (Ex. R-6 at 80-81) Based on the record provided, the IEP initiated in May 2003 was substantially similar to the then current IEP of August 2003. (*Id*. At 65-66) The only notable changes were: a) the notation in the PLP that the minor child had shown improvement in assignment completion; yet still worked at a

[29] This does not mean that an outside observer would necessarily agree with the IEP formed. Reasonable minds may certainly reach different conclusions. However, it is not for Panel to substitute its opinion for that of the IEP team if the record shows that the procedures required by the IDEA and the Missouri State Plan were adhered to by the school district.

slower pace academically, and b) the modification to regular education services to provide for an extra set of books. The request extra set of books was one of the items of concern presented by the Mother at the IEP meeting. The annual goal and the short-term objectives remained largely unchanged.[30] Further the IEP notes that the minor child was making progress on the short-term objectives and, thus, presumably on the annual goal. (*Id*. At 64)

During the May 2003 IEP meeting a functional behavioral assessment and a manifestation determination were conducted. The Mother did not support the findings of the manifestation determination. (Ex. R-6 at 73). However, despite this fact the Mother has not clearly presented facts as to what "alternative" placement should have been considered at this time. At the hearing the Mother even testified that the annual goal and short-term objectives were appropriate. Assuming for the moment that the Mother's list of concerns, if fully incorporated, constituted a different placement; the Panel is not persuaded that those concerns should have been incorporated into the IEP at that time.

In October 2003, approximately 6 weeks after the commencement of the 2003-2004 school year, another IEP meeting was convened. (Ex. R-9 at 85). The meeting was held at the Mother's request and in order to allow the IEP team to consider the report of Pat Adams[31], a licensed professional counsel. (Ex. R-8; Tr. 453-54). At the conclusion of the IEP meeting, the minor child's IEP was modified with respect to regular education services. However, PLP, the special consideration factors, and the annual goal and short-term objectives remained unchanged. (Ex. R-8). The Panel finds the October 2003 IEP appropriate.

Another IEP meeting was held in February 2004 to discuss the three-year reevaluation of

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[30] The only Change found was in short-term objective #2 were the accuracy percentage was increased to 95% from 90% (Ex. R-6 at 88)

[31] Ms. Adams did not testify at the hearing.

the minor child. (Tr.95; Ex. R-12) At this meeting, the Mother expressed concern about the minor child's motor skills. The Mother was advised that a physician's prescription was first required before Bowling Green could assess. The team (over the Mother's objection) determined that the educational diagnosis of OHI could continue without the need for a new assessment given the data currently available. In March 2004, the IEP team convened again and a new IEP was formulated. The specifics of the March 2004 and subsequent IEPs are set forth in the Panel's findings of fact.

In considering the Petitioner's claim, the critical question is whether the IEP in dispute "is adequate and appropriate for a particular child at a given point in time." ***Burlington***, 736 F.2d at 788. Yet, it is not the Panel's role to substitute its opinion for that of the school district if there is substantial evidence in the record to support its action. As the Third Circuit Court of Appeals noted in ***Fuhrmann v. East Hanover Bd. of Educ.***, 993 F.2d 1031, 1035, 1040 (3rd Cir. (1993), "[n]either the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." *Id.* at 1040. In this instance, the IEP implemented by Bowling Green called for the minor child to receive regular education services, modified to address the minor child's educational diagnosis, and supplemented by special education services. The series of IEPs implemented here demonstrates that progress was being met. Other school districts, if charged with providing services to this student, may well have implemented a behavioral intervention plan earlier, or conducted a new assessment at the three year reevaluation mark, or developed additional goals and objectives. Yet, the mere fact that Bowling Green did not take these actions does not render its services inadequate. At each juncture, the record shows the Mother's requests were considered and when the district declined to include a request a reasonable explanation was included. At every juncture, the record shows

the school district was assessing the services provided to the minor child based on his needs and, when indicated, the district was modifying its services. Most importantly, it is the Panel's determination that the services provided here were "reasonably calculated to enable the child to receive educational benefits." ***Rowley***, supra. Therefore, the Panel finds in favor of Bowling Green on the question of alternative placement.

B. Petitioner's Request for a Tutor/Mentor.

Petitioner asserts Bowling Green violated the IDEA and FAPE because a mentor/tutor was not provided to assist with organizational matters. 34 C.F.R. § 300.28. The issue presented is not whether the minor child would benefit from such structure and service. He likely would benefit. The issue is whether the service is necessary in order for the minor child to receive FAPE. As the ***Rowley*** court held, FAPE means special education and related services "reasonably calculated to enable the child to receive educational benefits." *Id*. at 188, 207.

Under the IDEA, the term "special education" means "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." 20 U.S.C. § 1401(16). The term "related services" is defined as "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education." 20 U.S.C. § 1401(17).

When permissible, services are to be provided in the least restrictive environment, which reflects the IDEA's preference for "mainstreaming" handicapped children. Supplemental aids or services are "aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate." 34 C.F.R. § 300.28.

The evidence here shows that school tutoring was available to the minor child in the regular education setting. The evidence also shows that several employees of the school district were willing to serve in a mentoring relationship with the minor child. Each type of support was routine in that it was available to any student in the District and did not require an IEP to be utilized by the minor child. The record is unclear as why Petitioner did or has not availed herself of these services for the minor child. Therefore, the Panel finds in favor of Bowling Green on this question.

C. Petitioner's Request for Earlier Bus Transportation.

The evidence here shows that the IEP team, over the concerns of the Mother, consistently concluded that the minor child did not require earlier transportation as a related service arising from his disability. The best argument that can be gleamed from the evidence presented by the Mother is that earlier transportation would have afforded him additional time to take advantage of services and resources at the school. However, there is insufficient evidence in the record to indicate that the minor child would have taken advantage of this additional time if he arrived at school earlier. More over, there is some evidence to conclude that he would have not benefited from the earlier arrival.

Equally important, Bowling Green in its brief cites to Appendix A of the 1999 federal regulations. Appendix A to the 1999 federal regulations provides, in pertinent part, that "[i]f a public agency transports nondisabled children, it must transport disabled children under the same terms and conditions." Appendix A, Question 33. That same section states that "[i]t should be assumed that most children with disabilities receive the same transportation services as nondisabled children." *Id.* There is no evidence in the record that Bowling Green provided similar services to nondisabled children as the Mother requested here. Therefore, the Panel finds

in favor of Bowling Green on this question.

D. Petitioner's Request for a "Safe Person".

It is the Panel's determination that the minor child did not require a "safe person" as a behavioral intervention in order to achieve FAPE. This determination does not mean that he would not have necessarily benefited from such an intervention. Nor should this determination prohibit future IEP teams from considering such a service if deemed appropriate. The evidence here shows that the minor child was making progress within his IEP goals and objectives and that not all of his behavioral issues were attributable to his educational diagnosis of OHI. "The fact that he is learning is significant evidence that his behavioral problems have, at least in part, been attended to." ***CJN v. Minneapolis Pub. Sch.***, 323 F.3d 630, 642 (8th Cir. 2003). The IDEA does not "require that schools attempt to maximize a child's potential or, as a matter of fact, guarantee that the student actually make any progress at all." *Id.* at 642; see also ***Adam J. v. Keller Indep. Sch. Dist.***, 39 IDELR 1 (5th Cir. 2003) (holding that student with autism received FAPE even where he continued to exhibit severe behavioral problems where the student made progress and the behaviors were improving). Thus, it is not for the Panel to conclude – especially in absence of compelling evidence – that the methodology employed by Bowling Green was wrong when the basic tenets of FAPE were met. Therefore, the Panel finds in favor of Bowling Green on this question.

E. Bowling Green's Failure to Provide Adequate Notice of Action.

The IDEA "establishes a comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their disabled children and to provide administrative and judicial review of any decisions with which those parents disagree." ***Honig v. Doe***, 484 U.S. 305, 308 (1988). Section 1415 enumerates the statutory

procedural rights accorded to parents under IDEA. ***Evans v. District No. 17 of Douglas County, Neb.***, 841 F.2d 824, 828 (8th Cir. 1988). Pursuant to this mandate, parents of children with disability have:

> (b) the right to receive "written prior notice . . . whenever such agency – proposes to initiate or change; or refuse to initiate or change; the identification, evaluation, or educational placement of the child, . . . or the provision of a free appropriate public education to the child";

20 U.S.C. § 1415; 34 C.F.R. § 300.504.

In the instant case, the evidence firmly established that Bowling Green provided notice of all actions taken with respect to the minor child. While the Mother continued to assert that at least one notice of action was not sent for some action taken by the school district, the Panel can find no evidentiary basis to support the claim in the record before it. Furthermore, one isolated instance would not immediately cause a violation of FAPE if the violation was technical in nature. See ***Independent Sch. Dist. No. 283***, 88 F.3d 556, 567 (8th Cir. 1996). Therefore, the Panel finds in favor of Bowling Green on this question.

F. The Implementation of an Undocumented IEP.

At the hearing, the Mother asserted that Bowling Green implemented an undocumented IEP. While uncertain of the date, the Mother continued to press the assertion. However, she presented no substantive evidence in support of this contention. Liability for an IDEA procedural violation may be found only if the violation compromised the student's right to an appropriate education, seriously hampered the parents' opportunity to participate in the IEP process, or caused a deprivation of educational benefits. See ***Independent Sch. Dist. No. 283***, supra. Certainly, implementing an undocumented IEP would seriously hamper a parent's ability to participate in the IEP process. However, based on the Panel's review of the record, we find no evidence that this happened. Therefore, the Panel finds in favor of Bowling Green on this

question.

G. Bowling Green's Adherence to Agreed to Accommodations.

At issue, is whether Bowling Green provided the agreed to accommodations for the 2004-2005 School Year. While the Mother raised this as a general assertion, much detail was given to an incident in January 2005, when the minor child was disciplined for an altercation with another student. The Mother contends that she was not able to intervene as promised. As result, the minor child was disciplined. However, the evidence shows that, first, her intervention would not necessarily prevent discipline from occurring and, second, the school officials did attempt to contact her in a timely manner. Furthermore, the findings of fact document numerous accommodations that were made to the minor child as well as record itself, which shows numerous examples where those accommodations were made. The Panel finds that Bowling Green adhered to all accommodations as agreed as reasonably as could be expected. The Panel, however, in the future would encourage the school district to take additional steps to communicate to the Mother the real impact (and limitations) of each accommodation provided the IEP before initiation. Therefore, the Panel finds in favor of Bowling Green on this question.

H. Petitioner's Request for Extended School Year Services.

Extended School Year (ESY) services must be provided to a student if the IEP team concludes that such services are necessary for a student to receive FAPE. 34 C.F.R. § 300.309(a). However, neither the IDEA nor its implementing regulations provide a specific standard to be used in determining whether ESY services are necessary. Missouri regulations state that "with regard to the content of the IEP, the public agency must develop an IEP for each student which includes. . . . documentation that extended school year services were considered by the IEP committee." In addition, the Missouri Department of Elementary and Secondary

Education has issued a Technical Assistance Bulletin dated September 2001 that articulates the agency's guidance with respect to the criteria to be used in determining ESY. As noted in that TAB, "[t]he purpose of ESY services is not to provide the student with an opportunity to continue to progress toward existing annual goals or to initiate new goals. Extended School Year services are intended to prevent ***serious*** regression on existing goals." Bulletin at 2. In the Bulletin, DESE stresses the importance of regression/recoupment standards in determining ESY. Bulletin at 2 (citing ***Yaris v. Special Sch. Dist.***, 558 F. Supp. 545 (E.D. Mo. 1983). The Bulletin suggests that the following factors can be used in the ESY determination: the nature and severity of the child's disability; areas of learning crucial to the child's independence and self-sufficiency; the child's progress, behavioral and physical needs; opportunities the child may have to practice skills outside the formal classroom setting; availability of alternative resources; opportunity for the child to interact with nondisabled peers; and ability of the child's parents to provide educational structure at home. Bulletin at 2.

Here, the record shows that there was little to no regression by the minor child to warrant ESY. The Mother herself conceded the point on cross-examination and the progress reports in the educational file also do not indicate serious regression. Accordingly, absent substantive evidence to the contrary, the Panel finds in favor of Bowling Green on this issue.

I. Petitioner's Challenge to Conduct Manifestation Determinations.

At issue hear, are three manifestation determinations made by Bowling Green. Each determination arose from an altercation that led to discipline. While the Mother raised a general challenge to the determinations, her major objection appeared to be the determination that the behaviors resulting in discipline were not related to his disability.

Pursuant to the IDEA, Bowling Green must conduct a manifestation determination for

any student with a disability if that student is going to be removed for more than 10 consecutive days or if the student has been subjected to a series of removals that constitute a change of placement. *See* 34 C.F.R. § 300.523. The parent must be notified of that manifestation determination decision and provided with the IDEA procedural safeguards. 34 C.F.R. § 300.523(a)(1). The determination is made by the members of the IEP team and other qualified personnel. 34 C.F.R. § 300.523(a)(2)(b).

In conducting the manifestation determination, the IEP team may conclude that the behavior was not related to the student's disability only if the team considers, in relation to the behavior subject to disciplinary action, all relevant information and then determines that, again in relation to the behavior subject to the disciplinary action, that the IEP and placement were appropriate and that the IEP services were implemented. 34 C.F.R. § 300.523(c)(1)(2). In addition, the team must consider and determine whether the disability impaired the student's ability to "understand the impact and consequences of the behavior subject to disciplinary action" and whether the student's disability "impaired the ability to the child to control the behavior." 34 C.F.R. § 300.523(c)(2)(ii),(iii). If the IEP team determines the behavior is not related to the student's disability, then the "relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities." 34 C.F.R. § 300.524(a).

Here, the IEP team concluded that each incident involved behavior that was not related to the minor child's disability. No evidence, except for the Mother's disagreement with the determination, is offered to contradict the IEP team's conclusion. Given that the record show that the minor child demonstrated some inappropriate behaviors that were not attributable to his disability, the Panel cannot find sufficient basis to reverse these determinations. Accordingly,

the Panel finds in favor of Bowling Green on this issue.

CONCLUSION

The Panel unanimously concludes that the Bowling Green R-I School District did not violate the provisions of the IDEA, FAPE or the Missouri State Plan for Special Education with respect to services provided to the minor child at issue.

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NOTICE OF RIGHT TO APPEAL

Any party aggrieved by the hearing panel's decision may bring an appeal to a court of proper jurisdiction. Pursuant to Section 162.962, RSMo, an aggrieved party may file a "Petition for Judicial Review" in state court as prescribed under Chapter 536, RSMo. Section 536.110, provides that such an appeal must be filed within 30 days of the mailing or delivery of the decision. An aggrieved party may also file an appeal in federal court by filing a complaint in a district court of the United States, without regard to the amount in controversy.

SO ORDERED this ____ Day of January 2006.

_____
EDWARD F. WALSH
CHAIRPERSON

_____/S/_____
GEORGE WILSON
PANEL MEMBER

_____/S/_____
MARY MATTHEWS
PANEL MEMBER

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Teri B. Goldman, attorney for respondent